United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1006

To be argued by
RICHARD C. CAHN

In The

United States Court of Appeals

For The Second Circuit

B P/S

UNITED STATES OF AMERICA,

vs.

RAYMOND GRABER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

CAHN & CAHN, P.C.
Attorneys for Defendant-Appellant
196 East Main Street
Huntington, New York 11743
(516) 427-3050

10411

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850
New York, N.Y. (212) 563-2121
Philadelphia, Pa. (215) 563-5587
Washington, D.C. (202) 783-7288

2/10

INDEX

TABLE OF CASES

STATUTES

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

77-1006

UNITED STATES OF AMERICA,

Appellee,

- vs. -

RAYMOND GRABER,

Defendant-Appellant.

BRIEF OF APPELLANT RAYMOND GRABER

Statement of Issues Presented for Review

1. Whether the defendant's grand jury answers were perjurious as a matter of law.

2. Whether representation of the defendant by his former counsel fell below the standards required by the Sixth Amendment.

3. Whether the government had the burden of showing beyond a reasonable doubt that there was effective representation by defendant's former counsel.

4. Whether the defendant's jury trial waiver was voluntarily, knowingly, intelligently and competently executed.

Preliminary Statement

This is an appeal (505)[1] from a judgment of conviction rendered December 10, 1976, in the United States District Court, Eastern District of New York (483) upon Special Findings of Fact and A General Finding of Guilt, rendered by Dooling, J., October 4, 1976, after a non-jury trial (392-418).

The statute under which defendant was convicted is 18 U.S.C. §1623; the judgment appealed from fined him $1,000 and placed him on probation for three years.

---

[1] Page references are to the appendix.

Statement of the Case

On July 11th, 1975, defendant appeared for 20 minutes before a grand jury empanelled in the Eastern District of New York (487-503). The grand jury was investigating possible violations of the Civil Rights Act, 18 U.S.C. 241-242, and the Hobbs Act, 18 U.S.C. 1951 (135)[2]. The investigation at that point had been in progress almost seven months and was destined to continue into the year 1976 (393). In the course of the investigation, federal investigators interviewed approximately 1,500 employees of the Town of Hempstead and of Nassau County; from 300 to 400 witnesses testified before the grand jury (137). From January 1975 until a couple of months before the defendant's trial in September 1976, no indictments had been returned, other than the instant indictment against this defendant (138).

---

[2]Defendant in 1975 was Deputy Commissioner of the Department of Conservation and Waterways of the Town of Hempstead. The Assistant U.S. Attorney advised defendant in the presence of the grand jury that "the grand jury is looking into allegations that Town of Hempstead employees have been coerced into giving portions of the salaries...to the Republican Party" (488), [emphasis supplied]. The Assistant then told defendant there had been testimony "that you have actively solicited employees possibly pressured them and indeed, given them cards of some sort with one percent figures on them. Now, I'm not saying and it hasn't yet been determined whether or not this isn't in fact a crime." (489) [emphasis supplied].

After the defendant was sworn, he was advised by the Assistant United States Attorney that, "you may fit into the category as a defendant rather than a witness" (489).

After testifying for approximately seven pages extremely discursively (488-495)[3], the defendant was asked the first of the questions quoted in the indictment:

> "Q. All right. Now, did you play any role within your department in actively soliciting these contributions from employees under you at any time?" (495).

Rather than answer "yes" or "no"[4], the defendant stated that he had been asked by Commissioner Udell of his department to "transmit campaign contributions" (495), and that "some [employees] did give them to him and he gave them to me" (495). Commissioner Udell then advised the employees to "give it to me", and "each and every ensuing year, I was the transmitter" (496). Defendant would not "be so presumptuous" to say that anyone "should give one per cent"(496).

---

[3] See, e.g., 493: "Q. All right. Mr. Graber, let me just interrupt at this point.", "A. Yeah.", "Q. As you can see, I'm obliging you at your request here, as you can see. There's a hallway full of people out there that we are trying to get out of here by lunchtime [it was then between 11:15 and 11:35 A.M.]. And if we can stick to the question, we'll be a lot better off." At trial, defendant testified that in the hallway outside the grand jury room there were 'Many, many people all screaming, 'I want to be next'. It was pandemonium". (300).

[4] which would have constituted a responsive answer.

The Assistant then said,

"Q. All right. Let me ask you this now.

A. Incidentally, I do not wish to commit perjury. There is a little more to that.

Q. All right. Hold on. [Emphasis supplied]

A. I don't want to commit perjury." (496-497)

The defendant was then asked:

"Q. A number of employees have testified that you would come around and give them a three-by-five or similar card on which it would have their name, their salary, and a handwritten notation somewhere on the card which was a figure representing 1% of their salary. Now, first of all, has that occurred?"

Defendant answered:

"No, not in the manner and the way that you said it." (Emphasis supplied) (497).

Asked next to relate his recollection, defendant prefaced his anwser,

"We're talking about 1966, you know, since this is only '75 through '74" [Appears thus in the transcript (497)][5]

[5]Defendant vigorously asserted that the grand jury transcript was inaccurate. At sidebar, his trial counsel advised the Court, "I find it difficult to believe that the certified shorthand reporter employed by the United States government would deliberately falsify grand jury testimony" (85); at 274, referring to the defendant, counsel told the Court, "And he denies that the transcript is accurate and things of that nature, of which there is no question about, your Honor." The latter comment was also at sidebar.

Defendant, concluding a rambling, and, in the main, unresponsive, answer (to the question about the 3x5 cards) stated, "I have given it to individuals and in some cases to their supervisor when they took the initiative and asked me for it." "Q. And roughly how many of these would you say you gave out per year?" "A. A substantial number." (498).

Finally (insofar as the indictment is concerned), the defendant was asked, and answered,

> "Q. So from the standpoint of what you just said she [Dorothy Hederick] would prepare the card for everyone in the department and then hold them so that they would be available if the individual requested it."
>
> "A. Yes, but by somewhere along the way we have received so many phone calls or so many requests, that I did give some to some supervisors with these instructions, so help me God! 'You have this. You've been asking for it for some. There's gonna be more. I'm too busy preparing a budget. They are only to be given to a man if he asks you a question which specifically can be answered by you.' And there was no one percent figure on those cards."

The grand jury transcript contains no indication that defendant was asked whether he had "suggested" to town employees that they should give a portion of their annual salaries to the Republican Finance Committee or whether he had

"approached" Town employees to solicit such contributions.

Nevertheless on March 5, 1976, he was indicted for perjury in giving the testimony previously described -

> "... in that he had suggested to Town of Hempstead employees that they should give a portion of their annual salaries to the Republican Finance Committee, and he had approached Town employees to solicit such contributions." (8)

The Trial Evidence

A. The Government's Case

Eighteen prosecution witnesses testified, of whom fifteen were employees of the Department of Conservation and Waterways of the Town of Hempstead. Thirteen stated that they had made 1% contributions since they had commenced public employment [Speranza (149); Doheny (157); Powers (163); Babiak ("The first few years and then I didn't")(177); Duvelsdorf (185); Parker 198); Carley (205); Lagomarsino (224); Aiello (231); Harrington (240); Olivieri (247); Keene (257); and Kranick (259)].

Eight employees testified that the defendant reminded them in the fall of one or more years that it was "time to contribute" [Speranza (150); Doheny (158); Gunderson (172); Parker (195); Lagomarsino (221); Aiello (230); Harrington (235); and Keene (255)]. Nine witnesses testified that they delivered their contribution checks to Mr. Graber [Speranza (150); Doheny (158); Duvelsdorf (187); Parker (202); Carley (205)[6]; Lagomarsino (224); Olivieri (247); Guma (251); and Kranick (260)]. Six witnesses conceded that they had not learned of the 1% contribution practice from Mr. Graber and

[6] Mrs. Carley was the defendant's personal secretary (205; 214)

probably heard it from fellow employees first [Speranza (154); Powers (168); Duvelsdorf ("It was common knowledge"; 191-192); Parker (heard it in the Parks Department; 198); Carley (206) and Keene (258).

Speranza (155-156); Doheny (161); Gunderson (173); Powers (167-168); Babiak (183-184); Duvelsdorf (190); Parker (199); Carley (212-213); Lagomarsino (227); Aiello (231-232); Harrington (241); and Keene (258) all testified that they had never been "pressured", or threatened with withholding of advancement or overtime if they did not make a contribution and that there was no coercion practiced upon them.

Gunderson, however, testified to an alleged conversation with the defendant there were would be "no more overtime" if the men didn't make their 1% contributions (170); Babiak said Gunderson told him the same thing (178); Guma testified that Graber told him, "he couldn't do nothing for me" about getting a job if he didn't make a 1% contribution (248);[7] and Lagomarsino claimed that Mr. Graber threatened to terminate Ackerman's overtime because Ackerman had not made a contribution (220), although Ackerman's overtime was in fact

[7] But Guma waited three years before reporting this alleged conversation to any law enforcement agency (253).

not terminated (225-227).

Doheny (159); Powers (165); Gunderson (170); Duvelsdorf (186); and Harrington (236) testified that the defendant gave them "index cards" with their salaries written on them to facilitate their 1% contributions. Babiak testified (180) that he got his card from Gunderson. Duvelsdorf testified that his card had 1% written on it (186); Parker testified that there were no cards (197) but rather an IBM print-out of salaries (194). Mr. Graber's secretary, Mrs. Carley, testified that he asked her to figure 1% on such IBM sheets (208). Harrington testified that one of his cards contained the 1% figure but only for the year 1973 (237). Olivieri got his cards from Harrington and not from the defendant (246). Keene testified that her salary information came on a "piece of paper" (256-257) and that 1% was written on it only during one year (257).

Defendant's secretary, Mrs. Carley, testified that the defendant never approached her but rather she went to him and asked him what she should contribute to the party (210). She also testified that the defendant to her knowledge did not approach employees but rather they came into see him (214). She also testified that she had never typed up index cards with salary and 1% information (216).

Lagomarsino, however, testified that he received calls from the defendant (223) relative to employees who were delinquent in making their contributions. Harrington testified receiving one such call (238). Kranick testified (399) that the defendant advised her to round off her contribution check, the cents to the next dollar, because the Republican Finance Committee "would not accept the check the way it was written" (261).

In rebuttal, Special FBI Agent Distler testified the defendant denied soliciting contributions but admitted acting as a "collecting point" for contributions (376).

B. The Defendant's Testimony.

The defendant testified that all Hempstead Town commissioners customarily receive a green and white computer print-out in August or September of each year relating to the collection of campaign contributions from employees (278). During the 1975 FBI investigation, Commissioner Udell of his Department was "hysterical" about two potential witnesses (285); one was Mrs. Speranza[8], about whom Udell said "We've got to get her" (285); the other was a former employee named John Zuretsky (290), about whom Udell said, "He could hang us all" (290). Zuretsky had been denied a promotion request

[8] a government witness against defendant (149-156).

because he had not made contributions, prior to the defendant's joining the Department (290-291).

Defendant said that he desired during his grand jury testimony to tell the truth but that he was interrupted (303)[9]. In good conscience he did not believe he was afforded the opportunity to tell the grand jury the entire story in the manner in which he wished to tell it (303). Assistant U.S. Attorney Druker's manner in the grand jury was "very accusatory, loud, rough, Jean Val Jean" manner (307). Some weeks later (313-314) he met Mr. Druker again and he and his lawyer were given the minutes of the earlier grand jury appearance and told to "read them out in the hall" (320). They "hadn't even read five pages of the minutes and Mr. Druker rushes over and says 'Let's bring him into the Grand Jury room' * * * Mr. Druker came out and Mr. Kilgannon [the lawyer] said to Mr. Druker, 'I don't see perjury in this transcript and therefore I am advising my client not to go back on the stand.'" (320)

Defendant gave the 3x5 cards referred to by Mr. Druker "which only describes one card"[10] to various

---

[9] See page 4 supra.

[10] Cf., testimony of Harrington (237) and Keene (257) that the 1% figure appeared on these cards only one year. Before the Grand Jury, defendant, limiting his testimony as to the years involved (497) [where the error "'75 through '74" appears], testified "there was no one percent figure on those cards" (500).

supervisors (325).

Defendant testified that during interviews with Walter Distler, an FBI special agent, the agent never asked him if he "solicited": "the only word he used was collect" (334). He asked the FBI agent to define what he meant by the word "collect", and, being assured that it was intended to ascertain whether he actually solicited donations from "individuals" in the department, he answered in the negative (334). Special Agent Distler took virtually no notes during his interview (339).[11] Looking at the agent's report did not cause defendant to change his testimony (340).

On January 14th, 1976, defendant, upon his own initiative, requested permission to speak to the District Attorney of Nassau County and talked to an individual by the name of Padgett (348).[12] Also present was

---

[11] Distler testified that he "destroyed" his notes (377).

[12] Padgett is an Assistant District Attorney and now a bureau chief.

Assistant District Attorney Zuffa[13]. He did not recall calling himself a "conduit"; that was not his word (350); however, one of his functions was to transmit contributions (356).

He was asked, "You are not a committeeman but you were active?" (368):

"A. Right."

"Q. You solicited many people for contributions.

"A. Yes.

"Q. Did you ever put the arm on anybody?

"A. That is not my style.

"Q. Answer the question.

"A. No, I never put the arm on anybody, no way." (369).

---

[13] Zuffa now works for John Sutter (349). The records of the District Court show that the U.S. Attorney's Grand Jury material, including the testimony of defendant at issue here, was turned over to the Nassau District Attorney by Druker, who obtained an order from Judge Costantino for that purpose. Following such turnover, defendant was indicted in Nassau County for violation of Civil Service Law §107, and now faces trial.

Assistant U.S. Attorney Druker is now an Assistant District Attorney in Nassau County.

The Verdict

On October 4, 1976, the District Judge rendered his special findings of fact and general finding of guilt (392-418). The Court found that a special grand jury was duly empanelled in January 1975 to conduct an inquiry into the charges of a corrupt political contribution system in Nassau County and that the inquiry was proper under the Civil Rights Act, 18 U.S.C. 241-242 and the Hobbs Act, 18 U.S.C. 1951 (392-393).

The Court further found that the defendant had willfully lied with respect to material matters in answering the questions quoted in the indictment, in that -

> "The Government's evidence at the trial established beyond a reasonable doubt that the defendant both had solicited, on behalf of the Town of Hempstead Republican Finance Committee, contributions equal to one percent of annual compensation and had suggested to Town of Hempstead employees that they give one percent of their annual compensation to the Republican Finance Committee of the Town of Hempstead." (401-402).

The Court discounted defendant's claim that "he was not given an opportunity to complete his answers but was hurried and interrupted before he had completed his answers" (405), on the principal ground that "there is no real disparity "between what he told the FBI agent, Distler, and his

grand jury testimony; nor between the latter and his reconstruction of the Distler interview at the trial (411).

The Court rejected the claim that defendant's grand jury answers, upon analysis, are so unresponsive and inexact that they could not form the basis of an indictment under 18 U.S.C. 1623 (Bronston v. United States, 409 U.S. 352 (1973)(415-417):

> "While the answers ... were discursive in the extreme, they dealt directly with the questions asked. In each case the answers produced, and were intended to produce, the impression that the defendant was not active in the solicitation of one percent contributions from employees of the Town of Hempstead, but was merely one who stood passively ready to transmit contributions voluntarily offered to him for transmittal to either Commissioner Udell or to the Republican Finance Committee of the Town of Hempstead." (415).
>
> * * *
>
> "In the present case, in contrast [to Bronston] the defendant's answers, while discursive and circumstantial, were precisely responsive. They depicted his role; they conveyed very complete answers to the questions asked. The answers he gave could not have been deprived of their content as responsive and untrue by any words that the defendant could have added to them short of total and explicit recantation before the Grand Jury of the substance of the answers given." (417).

The Motion for a New Trial

On December 6, 1976, defendant moved to set aside the verdict and for a new trial; for an order vacating a waiver of jury trial executed by defendant September 7, 1976; and disqualifying Judge Dooling from further proceedings (419-471). The motion was heard on December 10, 1976 (472) and denied from the bench (472-482).

A. Conduct of Trial Counsel.

1. Uncured Possible Conflict of Interest.

Three other Hempstead Town employees were arraigned March 18, 1976 on similar charges. On the arraignment date, John Sutter, Esq., appeared for the defendant and the three other parties as well. The Court promptly raised the question whether "it is utterly safe in the views of the Second Circuit for you to represent all four defendants" (9). Counsel saw "no conflict whatsoever", but Judge Dooling pursued the matter, expressing concern about "a tremendous conflict problem because people's cases have different colorations *** counsel's views of the case are formed very largely on the basis of what his client tells him *** I wonder if it is safe to have four cases in which you are learning things from four different men who may have different situations both in the county employment structure and their relations

during these periods which would impair your capacity to advise them straightly and effectively. Finally I would be concerned that disclosures made by one or another of your clients might in some way impair your capacity to exchange the fullest confidences with each of your other clients" (10). * * * "What we're talking about, really, is effective representation of the defendants which is what they are absolutely entitled to. They have to be effectively represented." (14).

Thereafter counsel wrote a letter to the Court (15-16) in which he stated that "it is patent that there is a real possibility that there is a conflict of interest." (15). "Accordingly I am making arrangements for separate counsel to represent the defendants Cosenza, Graber and Phears and will make arrangements for my appearance to withdraw and the retention of new counsel on their behalf. I shall continue the representation of Mr. Woolnough." (16).

Mr. Sutter continued, nevertheless, to represent this defendant through the conclusion of the trial.[14]

---

[14] The record is silent as to whether this letter was ever exhibited to defendant Graber, or counsel's views ever expressed to him. The letter itself was filed in Cosenza's file, 76 CR 164 and not made a part of this record until it was discovered when this file was being indexed for appeal.

2. Lack of Communication With Client; Lack of Trial Preparation.

The motion for a new trial filed December 6 (419-471); the transcripts of proceedings held August 31st, (17-34); September 1 (37-70); September 2, 1976 (71-114) and September 7 (116-119) reveal a rapidly deteriorating relationship between defendant and counsel during the pretrial period. Although no evidentiary hearing was ever held with respect to the matter contained in this section of the brief, the government submitted no evidence in opoosition to that adduced by defendant in the post-trial motion.[15]

Continually for months the defendant attempted to confer with his attorney. On only two 15-minute occasions from March to August, to the best of his recollection, did defendant personally confer with him (423).

On the afternoon of August 30, he had a third brief conference with Sutter, for 10 or 12 minutes (423). Up to the time of trial, he had had 45 mintues in total attorney-client consultation time (423).

From indictment to late August, counsel did not respond to the defendant's letters and phone calls (423).

---

[15] One of the post trial requests for relief was that a hearing be held relative to the claim of ineffective representation under the Sixth Amendment. The Court denied the application December 10, 1976 without a hearing (482).

Defendant took the initiative and visited counsel's office on many occasions (423). Approximately six times, James Frazer, a law clerk employed by Sutter, "reluctantly" talked to defendant - sometimes in the reception room only (423). Virtually no time was spent discussing substance or case preparation. The total time involved in these unproductive sessions with Frazer was approximately three hours (423).

As the time passed following defendant's arraignment, he became "increasingly concerned with the lack of meaningful contact" with his attorney (423; 463). He wrote four letters to him and one to the law clerk (447, 448, 450, 451, 453).

On August 17th, the defendant was examined by his physician and found to be generally "in an exhausted condition, marked anxious .... he was having difficulty concentrating on what he was doing and saying." (485).

One of the causes of defendant's anxiety was that he "specifically wished [his] attorney to subpoena certain documents from the Town of Hempstead" and various individuals (423-424).[16]

---

[16] Among the witnesses whom defendant desired to subpoena were various town employees who could have testified that he never solicited political contributions, distributed 3x5 index cards, or advised employees about the practice of donating 1% of their annual salaries to the Republican Party (423-424). At least one of these witnesses would have testified that he [the witness] had specifically advised Assistant United States Attorney Caden (Government's trial counsel) of the defendant's lack of involvement (424).

The names and proposed testimony of a number of these witnesses were given to counsel's office prior to or during the trial and, in fact, several had telephoned the attorney to offer their testimony; but their calls had not been returned and counsel did not call or subpoena any (425).

Defendant also desired his attorney to subpoena for purposes of impeachment disciplinary and personnel records of various town employees who, it was believed, would testify against the defendant, and who in fact did testify against him (425). No subpoenas were issued.

Defendant was a veteran of World War II and his Veterans Administration medical records showed the existence of severe emotional problems since his discharge after the war (426). Defendant desired his attorney to subpoena these records and advised him of their contents; no subpoena was issued (427).

In mid-July the originally-scheduled trial date approached and defendant attempted to see his lawyer and succeeded only in seeing the law clerk, Frazer. Two or three appointments that he succeeded in making with the attorney were broken (464). Because of this nearly complete lack of communication with his lawyer, defendant was unsure as to when his trial would begin and did not wish to be away in Ithaca,

N.Y., (taking his son to Cornell) at a time he was required to be present in federal court (464).

At the end of the first week in August, the defendant saw his attorney for 15 minutes, reporting to his wife afterwards that his attorney told him that "under no circumstances" would there be a trial in August (464), in part because of Sutter's prior commitments to the Friedgood murder trial and the Ulascewicz case, and in part because of the lawyer's planned 2-week vacation (465).

In mid-August defendant told his wife that he had heard that the Assistant United States Attorney had placed the Government's witnesses on stand-by for trial August 30th (465). He thereupon wrote a letter to Frazer to advise him of this fact; but he was still being assured by Sutter's office that no trial would be held in August (465).

Defendant received a telephone call sometime during the week of August 23rd to be at Mr. Sutter's office on Friday afternoon, August 27th, at 2:00 P.M., for the purpose of meeting with Mr. Sutter. Defendant and his wife waited in the lawyer's waiting room from 2 until 5 P.M. No one saw defendant. At 5, the receptionist told the defendant that Mr. Sutter would not be back that day (465). On August 30th, defendant got another telephone call to be at Mr. Sutter's

office at 2:00 P.M. and again defendant's wife accompanied him. After a 2-1/2 hour wait in the waiting room, the law clerk Frazer emerged from an office into the waiting room and dropped defendant's grand jury testimony on his lap and told him to read it (465). About 4:45 P.M. defendant was called into a conference with Mr. Sutter. He was with his attorney for approximately 10 minutes at the most and emerged and told his wife, "John said that it's perfectly alright to go and we should give his regards to Cayuga's waters so long as we left our itinerary with Barbara his secretary" (466). In the presence of his wife, defendant told the secretary, Barbara, that he and his wife would be leaving Long Island at 8 o'clock in the morning the next day (August 31st) and would be driving directly to Ithaca and they would check in at the Sheraton Motor Inn on Triphammer Road, Ithaca. They planned to stay overnight and the following day, September 1st, they would be leaving Ithaca at approximately 8 A.M. to return to Long Island and should be back by mid-afternoon on that day (466). As the defendant and his wife left the office, he told her that the lawyer had said that he, Mr. Sutter, would have to be in Court the next morning but that Dr. Stefano's August 20th medical report about the defendant's condition would suffice instead of the defendant's personal appearance (466).

On August 31st, the defendant and his wife did drive to Cornell and did stay at the Sheraton Motor Inn on Triphammer Road. They were in their room continuously from approximately 8:00 P.M. on (466).

At approximately 12:30 A.M., September 1st, after the defendant and his wife had retired for the night, they received a telephone call from Frazer. Frazer told defendant that his request that the trial be held in Westbury had been granted. He did not say the trial would be held the next day, but went on to say that Mr. Sutter wanted to speak with the defendant at precisely 10:30 A.M. that morning (September 1) and he should call the lawyer's office collect at that hour and that he should be personally in Mr. Sutter's office at 4:00 P.M. that day. At no time was defendant ever told that the trial had been commenced or that the judge that day had issued a warrant for his arrest (466-467).

Upon telephoning Sutter's office at 10:30 A.M., while returning to Long Island, the defendant was told that neither Mr. Sutter nor his law clerk were present; no one there had the slightest idea why he had been asked to call (467). Defendant thereupon told Sutter's law partner, Dana Winslow, that he should please give a message to Mr. Frazer and Mr. Sutter that he would, indeed, be in the office at

4:00 P.M. that day as requested (467).

Upon defendant's arrival home in West Hempstead at 2:30 P.M., he was seized by two United States Marshals, placed in handcuffs and arrested.

The defendant was produced before Judge Dooling at 5:00 P.M. that day and after asking, "Am I allowed to talk?", stated, "Judge Dooling, I have inwardly been trying out and if counsel was someone who was an attorney friend of mine, I had wished to call you up for many weeks" (44). The defendant was told that he was arrested because, "we couldn't have any assurance at all from any source that you would be available tomorrow" (45).

The defendant reported the instructions received from his attorney (45-46) and then poured out his frustrations with his attorney, principally the attorney's failure to meet with him (47):

> "... each time it was like a brainwashing, he's too busy, he can't see you...."only three or four days before our scheduled trial, never having met with my attorney .... I was ... about to call you up [the Judge]. I was scared even to do that....(47-48).... I pleaded and pleaded with Mr. Sutter to start preparing the defense. I pleaded with him. We never met. We never discussed substance. We

never discussed possible witnesses." (48)[17].

3. Undermining the Client's Credibility and Trustworthiness, To The Trier of the Fact.

The defendant's arrest upon a warrant issued by the trial court was not an auspicious beginning of the relationship between the Court and the defendant whose credibility was to be judged - by the Court without a jury.

The defendant's attorney's contribution to this unhappy event; and his reinforcement of any unfavorable impression derived by the Court of the defendant, are detailed in this section:

On August 31st, defendant's attorney told the Court that he had "advised the defendant that he must appear in court today" (19)[18]. The lawyer then described his client

---

[17] Upon his arrest defendant thus revealved to the judge the pertinent facts upon which the post-conviction motion for a new trial was later based. On that date, he did not know, however, what had transpired in Court either the prior day when his attorney had been present or that morning when Assistant United States Attorney Caden appeared before the Court to ask for issuance of the arrest warrant.

[18] Defendant's version, that he had been cleared to go to Ithaca as long as he left his itinerary with Sutter's secretary, was in part corroborated August 31st by Sutter's advising the Court that in fact Mr. Graber was staying in Ithaca "at a place called the Sheridan" [sic] (20).

as a man who is "obviously trying to avoid the due processes of the law" (21). He also told the Court, "I don't think he's a nut, and you can put that in quotes please, but he certainly does have hang-ups" (22-23).

The Court was obviously convinced that the defendant had willfully defied his attorney's instructions to appear in Court:

> "What are we going to do at this point. It's easy enough to get the Marshal in the Northern District to fetch him in, no problem with that it can be done by telephone. We can teach him a lesson but is that the way to start the case?" (25).
>
> * * *
>
> "The only argument that's made for that is that the man is a neurotic and maybe the whole world has to bend around people. I don't like it, nobody likes it. I have often thought that maybe all of us ought to have a few roads in reserve that we can explore on occasions of difficulty and impasse, and make life very easy for us all." (25).
>
> * * *
>
> "MR. SUTTER: Judge, if I may, as a layman, I believe he is a genuine neurotic but he is not a psychotic" (26). *** "I must say I apologize again on behalf of my client. I don't like it either because I had to appear here and I drove from Mineola with this." (26)
>
> * * *
>
> "THE COURT: Well, I don't see how you can get anywhere with Mr. Graber unless you were able to tell him there is a warrant out for him".
>
> "MR. SUTTER: I intend to tell him that, Judge" (29).

The Judge then pointed out that the trial could not commence without defendant's presence and significantly stated,

> "Willful non-attendance at trial should not be any different than willful absenting oneself from the trial after it has been started." (31)

Defendant was to be contacted by his attorney, specifically advised prior to 10 A.M. the next day to be in Mr. Sutter's office by 4 o'clock that afternoon; if he did not so agree, a bench warrant was to execute as of 10 A.M. September 1st (32).

The lawyer had home telephone numbers of both the Assistant United States Attorney and the Judge (32). On September 1, it was clear he had not advised either of the conversation that Frazer had had with the defendant at 12:30 A.M.[19]

At 10 A.M., September 1st, defense counsel was not present and Mr. Caden applied for the issuance of the bench warrant, stating that Mr. Sutter had not called him, that he had called about 9:50 A.M., and been told that counsel had had no information the night before; that "he had made an

---

[19] And Frazer had not then advised defendant of the issuance of the warrant for his arrest (467).

effort personally through his secretary" to contact the Sheraton Hotel[20], "was advised that Mr. Graber had checked out"; that counsel "believed" that Mr. Frazer had spoken to the defendant and "also believed" that Mr. Graber was "thought to be" on his way home "but wasn't absolutely certain about that" (39-40):

> "Mr. Sutter and I quite frankly came to no conclusion as to where Mr. Graber is this morning and whether he is on his way back or on his way somewhere else." (40)[21].

---

[20] The Grabers were actually at the Sheraton Motor Inn.

[21] Judge Dooling wanted to know if anybody had communicated with Mr. Graber and Mr. Caden answered: 'Mr. Sutter was quite vague and I didn't press him, quite frankly, because Frazer wasn't there and Frazer is apparently in another court and I was led to believe that Mr. Frazer or Mr. Sutter would call me to confirm that his client is on the way back" (40-41)"... [f]rom the agreement that we had yesterday had either one spoken to him and had this conversation and that where Mr. Graber indicated he was on his way back he would have called me. So Mr. Sutter also indicated to me he had no reason to believe with any real certainty he would see Mr. Graber today. He made an effort personally to call and find out where his client is" (41).

After the defendant's arrest, he recited to the Court much of the information later contained in the post-trial motion (44-56). At one point he said his lawyer "knew where to get me even 12:30 last night" (54). Judge Dooling, incredulous, asked, "He knew where you were?" (54). Substitute counsel noted, "One of the major grievances seems to be lack of communication between himself and his counsel (57).[22]

At 28, Mr. Caden stated, "Secondly, that Mr. Sutter in the strongest word I have ever heard an attorney use [emphasis supplied] since I have been with the Assistant Attorney's office, informed me that he informed the defendant of this trial and when the defendant said he was either unwilling or unable to attend, his words were he ordered him to be in the courtroom the following day. On that representation as

---

[22] At page 60, the Court said,

"The impression produced by Mr. Sutter to me ... was that Mr. Graber had calculatedly absented himself from the district and from this Court." (60) ***
"That is not obviously, we wouldn't have asked the Marshals to take him into custody to assure his presence in Court tomorrow unless we had been given the unmistakable impression that unless that was done he would not have appeared for trial. That is the only reason it was done now. That is all I am interested in. Now Mr. Graber has other problems with his counsel. If he has come to a parting of the ways with his counsel and that is understandable we'll have to deal with it when it comes up." (Emphasis supplied). (60-61)

I understand it Mr. Graber left Mr. Sutter's office and he went to Cornell."

At page 69, substitute counsel stated, "I don't think anybody really believes that Mr. Graber is fleeing the jurisdiction to avoid the processes of the Court".

The Court responded, "No, but I do."

On September 2, the colloquy continued:

MR. SUTTER: "If your Honor please, the defense counsel is ready to proceed. I don't know if there exists a satisfactory attorney-client relationship." (73)

* * *

(at sidebar)
MR. SUTTER: "If your Honor please, you can obviously see that there is a difficulty between attorney and client in this particular matter. I have received from Mr. Graber accusations concerning the United States Attorney. I have my own opinion as to the believability of those things concerning Mr. Caden and my relationship with Mr. Caden has been most honorable at least in my opinion. I don't know what his is. [Emphasis supplied].

"I find it difficult to believe that the certified shorthand reporter employed by the United States government would deliberately falsify grand jury testimony. I find that rather difficult. Can there be errors. There can be errors in anything. Can there be omissions? Yes. Falsification, I find hard to believe. I

> find it difficult to believe that a gentleman of the stature of Mr. Caden would threaten witnesses, would employ all of those things that we would find abhorent in the practice of the criminal law" (84-85).
>
> * * *
>
> "I want to say very frankly I abhor the accustations against Mr. Caden and the United States Attorney's staff. I have not found those to be verified in any manner whatsoever." (87)
>
> * * *

During a recess in the September 2 proceedings a conference was held between defendant and his attorney. Defendant's 26-year old son was present at this conference and in a post-trial affidavit stated that Sutter told the defendant that his arrest was a mistake, but reaffirmed his insistence that he had told Mr. Graber to be in court, telling his son, "Your father only hears what he wants to hear. I'll testify to that." (459) The lawyer then told the defendant that he "had to" apologize for the defendant's statements about the United States Attorney threatening witnesses, but that he would pursue the issue of misconduct on the part of the U.S. Attorney's office (460).

During the trial, defendant's counsel made a number of comments about his client, some at sidebar out of defendant's hearing. A sampling:

> "He's got some nasty things to say about Mr. Druker and he denies that the transcript is accurate and things of that nature, of which there is no question about, your Honor" (274).

* * *

"I can assure the Court that I have spent with Mr. Graber since our last recess in excess of 15 hours for about twenty minutes of direct testimony. He now has his own ideas with respect to what the defesnse should be, they don't concur with mine." (273)[23]

* * *

"in order that I can go over all of these witnesses with him whom I - I don't think they have any relevance in this case and I am candid to say that. So that there can be no criticism of anybody's conduct with respect to this case in the event that there should be a conviction." (273)

* * *

"Last night we reached an agreement concerning other witnesses and now he has just revoked that agreement at the recess and wants other things done". (275)

* * *

"I am asking you that we don't have any defects in this case wherein he is going to claim or be it in my opinion that he is incorrect that he wasn't afforded an adequate opportunity." (275)

* * *

"it is just that I don't want any criticism leveled with respect to any possible conviction."(277)

* * *

"Judge, I am a believer in finality. I happen to be a trial attorney and I understand these situations, but this is a very

---

[23] Defendant categorically denied that Mr. Sutter spent 15 hours with him during the period he mentioned or during any period (439).

difficult man. As a matter of fact he is the only one besides myself who I can't figure out." (277)

* * *

"Judge I don't believe I have anything more but I don't want any more trouble from him." (327)

* * *

"I am telling you it's my present intention. This guy is a boatload of bananas. If he insists upon something, I'm going to have to do it. You follow. If it does get into any other areas, they're not going to be of any significance, I can assure you." (328) [Emphasis supplied].

* * *

"I only want to use this to refresh his recollection as to his state of mind when he testifies today. I'm dealing with a bunch and a half of diamonds and you can admit that." (293)

* * *

"I told your Honor that the other day and I have appeared every time. I am preparing to go ahead. My defendant is not...." (100)

B. Competency of Jury Waiver.

Defense counsel stated on September 2 that, "Mr. Graber is emotionally disturbed to the extent, if your Honor please, that he cannot cooperate in the defense...."

"I have just asked in the interests of mercy, not in the interests of justice, and I think that Mr. Graber will confirm the fact that he at this point is incapable of conferring with me. Although we are friends again, he just can't do it, Judge. I sat down and asked questions and things and he admits to me, now, that he can't answer these questions that he is concerned about this, that and other things...." (93-94)

Dr. Stefano, after examining defendant at noon wrote the Court that he was "at a point of nervous exhaustion due his arrest, etc. I feel that he should be home in bed c̄ sedated until 9/7/76" (484).[24]

Defense counsel stated,

> "Judge, I can tell you quite frankly I have not been able to rationally communicate with this defendant....I can tell you, quite candidly, when we spoke, he was weeping; he was disturbed." (97)

---

[24] At the examination, Dr. Stefano increased the defendant's librium prescription to 10 milligrams, four times per day and defendant took an additional dose of librium at the hospital before returning to Court for the brief afternoon session of September 2nd (468).

At page 102, counsel asked the Court, "Take a look at my defendant. Can you possibly put him on trial in his condition now? I can't go to trial with a man in that condition Judge. I don't think it's proper and I can't get up here and waive the right that he has without his knowledgeable consent".[25]

The Court ordered "an examination under section 4244" to determine the ability of the defendant to consult with counsel in his own defense (109).[26]

The trial was adjourned to Monday, September 7th.

The next morning, September 3, at 8:30 A.M., the defendant was rushed by fire department emergency squad to Mercy Hospital where he was diagnosed by Dr. Stefano as having anxiety exhaustion, dehydration gastritis and possible coronary. (469)

On the morning of September 7th, without any explanation as to the circumstances of its execution, a

---

[25] However, eight pages later, counsel turned to his client and asked, "Do you still desire to waive a trial by jury?"(110) Immediately thereafter counsel said, "It may be, you know Judge, if we got a man who is emotionally disturbed, the last thing I want to do is have another attorney come in if he gets convicted, that the waiver was not executed competently. My waiver is executed competently." The Court stated, "I think it is, but I don't think it carries much weight. It is the defenant". (111)

[26] No report of this examination was filed and made part of the record.

written jury trial waiver was filed with the Court. (118)

At no time was a hearing conducted relative to the circumstances surrounding execution by the defendant of the jury trial waiver; at no time was a hearing held relative to the defendant's continued representation by Mr. Sutter.

POINT I

THE ANSWERS OF THE DEFENDANT BEFORE THE GRAND JURY WERE NOT PERJURIOUS WITHIN THE MEANING OF BRONSTON V. UNITED STATES, 409 U.S. 352 (1973).

In Bronston v. United States, 409 U.S. 352 (1973), the Supreme Court recognized that testimony before grand juries may often be unresponsive and misleading (intentionally or not) and yet not be untruthful. The Court prohibited the use of the negative implication of a literally true but unresponsive and arguably misleading answer to find perjury. In so doing, the Court rejected the suggestion that the meaning of unresponsive answers may be implied or may be the subject of speculation: Intent to mislead the grand jury is not a crime nor is there an offense of perjury by implication, Bronston v. United States, supra, 409 U.S. at 359.

The Court did recognize that unresponsive and misleading answers create problems in that they impede the investigatory function of the grand jury. It held, however, that the solution to this problem was not more perjury indictments but rather the formulation of specific and narrow questions by those who examine grand jury witnesses:

> "It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to

> bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.
>
> "It is no answer to say that here the jury found the petitioner intended to mislead his examiner. A juror should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner;", Bronston v. United States, supra, 409 U.S. at 358-359.

In the instant case the government did not "probe, pry and press its inquiry", rather it rushed through its examination of the defendant stating:

> "There is a hallway full of people out there that we are trying to get out of here by lunchtime." (493).

Rather than attempting to harass the witness, the Supreme Court would suggest that:

> "... if the questioner is aware of the unresponsiveness of the answer,... the very unresponsiveness of the answer should alert counsel to press on for the information he desires.", Bronston v. United States, supra, 409 U.S. at 362.

Apparently the government did not have enough time to "press on for the information" it desired. Rather than "flushing out the whole truth with the tools of adversary examination", the government was content to ask vague, broad and misleading questions that produced vague, unresponsive and perhaps even misleading answers.

The holding in Bronston was clear:

> "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.", Bronston v. United States, supra, 409 U.S. at 361.
>
> * * *
>
> "Precise questioning is imperative as a predicate for the offense of perjury.
>
> "It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lombard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution.", Bronston v. United States, supra, 409 U.S. at 362.

The questions that produced what the government now claims is perjury were ambiguous and vague. The defendant was asked if he "played a role" in soliciting political contributions. The defendant's discursive answer must either be construed as an affirmative answer (in which case it was true) - or as unresponsive.

Where the question admits of several meanings, the defendant's response cannot be adequately tested and it becomes impossible to show beyond a reasonable doubt that perjury occurred, United States v. Wall, 371 F.2d 398 (6th Cir., 1967). Imprecise questions produce imprecise answers with many possible interpretations of the answer possible. The finder of fact is, therefore, left with an

insufficient basis to conclude beyond a reasonable doubt that perjury has occurred. Bronston requires that for a perjury charge to stand, the questioner must identify the pertinent time frame and actors and narrow the inquiry from generalities (such as "did you play a role?") to specifics (see United States v. Razzaia, 370 F.Supp. 577 [D. Conn. 1973] and United States v. Esposito, 358 F.Supp. 1032 [N.D. Ill. 1973] cert. denied, 414 U.S. 1135 (1973).

United States v. Paolicelli, 505 F.2d 971 (4th Cir. 1974) held that the minds of government counsel and witness must meet on the definition of the words being used in the interrogation, Id., at 973. In this case no meeting of the minds has been established. What, precisely, is meant by the words "suggested", "approached" and "solicit"? (8). If one orders dessert after dinner, doesn't one thereby "suggest" that others may wish to do the same? If one sends an emissary to another, is that not an "approach"? If one is placed on a fund-raising committee, is he not himself subtly "solicited" to contribute personally?

POINT II

REPRESENTATION OF THE DEFENDANT BY HIS FORMER COUNSEL FELL BELOW THE STANDARDS REQUIRED BY THE SIXTH AMENDMENT; THE POST TRIAL MOTION FOR A NEW TRIAL SHOULD, THEREFORE, HAVE BEEN GRANTED.

Until 1970 the prevailing standard used by the Courts of Appeals to determine if a defendant has been denied his Sixth Amendment right of effective representation was what has been termed the "mockery of justice" test. The representation had to be so "woefully inadequate 'as to shock the conscience of the court and make the proceedings a farce and mockery of justice.'", United States v. Currier, 405 F.2d 1039, 1043 (2d Cir. 1968), cert. denied, 395 U.S. 914 (1969); quoting United States v. Wright, 176 F.2d 376, 379 (2d Cir. 1949) cert. denied, 388 U.S. 950 (1950); see also Bell v. Alabama, 367 F.2d 243 (5th Cir. 1966), cert. denied, 386 U.S. 916 (1966); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965).

The right to effective assistance of counsel derives from the Sixth Amendment mandate that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court recognized that the Constitution mandates effective assistance of counsel.

The "mockery of justice" standard has been found to be too narrow and unworkable by a majority of the Courts of Appeals. Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit has maintained that the "mockery of justice" test "... requires such a minimal level of performance from counsel that it is itself a mockery of the Sixth Amendment.", The Defective Assistance Of Counsel, 42 U.Cin.L.Rev. 1, 28 (1973); see also, The Realities of Gideon and Argersinger, 64 Geo.L.J. 811, 819-24 (1976):

> "[Under the mockery test] lawyers could appear in court drunk or could fall asleep during trial, and yet still not be found ineffective. Judges who never would even think to apply these tests to other professions have ignored gross incompetence among lawyers. Who would be content with their doctor because he did not make a mockery of medicine, or was not grossly incompetent? The second step forward in the implementation has been taken only within the past five years, and has not yet been taken by all jurisdictions. In two recent cases involving collateral attacks on guilty pleas [Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602 (1973) and McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970)], the Supreme Court broached the issue of ineffective counsel and asked whether counsel's advice fell 'within the range of competence demanded of attorneys in criminal cases.' Adopting this approach, a majority of the United States Courts of Appeals have rejected the mockery test and now require that counsel 'exercise [the] customary skill and knowledge which normally prevails at

> the time and place' [Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970)], or 'a minimum standard of professional representation' [United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975)], or 'reasonably effective assistance' [see e.g., Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C.Cir. 1973)]. Approximately half the state courts recently have adopted similar sounding tests [see e.g., Risher v. State, 523 P.2d 421 (Alas. 1974); People v. White, 182 Colo. 417, 514 P.2d 69 (1973); State v. Tucker, 97 Idaho 4, 539 P.2d 556 (1975); State v. Thomas, 203 S.E.2d 445 (W.Va. 1974); State v. Harper, 57 Wis.2d 543, 205 N.W.2d 1 (1973)."

The "mockery of justice" test is, we respectfully suggest, in decline[27]. This Court has thus far adhered to the old test, United States v. Yanishefsky, 500 F.2d 1327, 1333 (footnote 2) (1974). We urge the Court to abandon the test, which may not in any event constitute a useful tool in evaluating Sixth Amendment claims:

> "... Such standards beg the question of what is customary or reasonable for a lawyer to do prior to or at arraignment, plea bargaining, trial, or sentencing. Thus far the courts have failed to address these questions, with the result that the new test has made little change. ... In some jurisdictions that recently rejected the mockery trial, the courts already have shown such a jaded view of what is 'customary' or 'reasonable' as to remove all bite from the new formulations. The mockery language may have

---

[27] Judge Dooling suggests its "days are numbered" (473).

> been discarded officially, but its spirit, the spirit of papering over, lives on.
>
> * * *
>
> "...[W]hat matters is not developing a new verbal formulation but developing a clear understanding of what the words mean. In United States v. Decoster [487 F.2d 1197 (D.C.Cir. 1973)], we not only [adopted] our own version of a 'reasonableness' test for ineffectiveness, but we also followed the Fourth Circuit [Coles v. Peyton, 389 F.2d 224 (1968)] [by] enunciating prophylactic rules of conduct for defense counsel. The requirements DeCoster sets forth are minimal: Counsel must generally follow [American Bar Assn. standards for the defense function (1971)], and specifically must confer with his client without delay and as often as is necessary to elicit matters of defense, discuss fully potential strategies and tactical choices with his client, promptly advise his client of his rights and take all actions necessary to preserve them, and conduct appropriate investigations, both factual and legal. Precisely because these rules are so elementary, no one can dispute that a 'reasonable' lawyer absent good cause, would comply with them. Consequently, these rules begin to give some content to our generalized requirement that defendant's receive 'reasonably competent assistance', and they have been adopted by other jurisdictions to define similar reauirements in force in those jurisdictions.", Bazelon, The Realities of Gideon and Argisinger, supra at 819-24.

In United States v. DeCoster, supra 487 F.2d at 1202-1204, Bazelon, C.J., noted that "reasonably competent assistance" was only a "shorthand label".

> Whatever label is used [and we might even suggest a "shock the conscience" test, c.f., Rochin v. California, 342 U.S. 165 (1952)], it must apply to an attorney who

refuses to meet with his client,[28] fails to subpoena witnesses, causes his client's arrest, continuously demeans his client to the trier of the fact, and, beyond his client's hearing, tells the trier of the fact to disregard or disbelieve what his client is about to testify to.[29]

---

[28] The right to the Assistance of Counsel preserved by the Sixth Amendment is not satisfied by the assistance of a non-admitted law clerk.

[29] The Assistant U.S. Attorney said counsel's remarks were "perhaps inexcusable" (472), Judge Dooling commented "those things would not have been said if there was Mr. Graber's presence at the sidebar" (475). He also said, "I do not think that it was a happy relationship of representation. It was perfectly plain to me that Mr. Graber was acutely unhappy with it" (477).

POINT III

DEFENDANT'S FORMER COUNSEL'S SUBSTANTIAL INEFFECTIVE REPRESENTATION SHIFTED TO THE GOVERNMENT THE BURDEN OF SHOWING BEYOND A REASONABLE DOUBT THAT THE VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHTS WAS HARMLESS.

In United States v. DeCoster, 487 F.2d 1197, 1204 (D.C.Cir. 1973), after discussing the requirements necessary for effective representation the Court held:

> "If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government, 'on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby', Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)."

In United States v. DeCoster II, 20 Crim.L.Rep. 2080 (10-19-76) the Court of Appeals found that the failure to conduct timely witness interviews, coupled with the strong liklihood that this failure impaired a valid defense, necessitated application of the presumption that defendant was denied effective counsel.

The same facts apply here. To the extent they are not established by the post-trial motion papers, a hearing should have been granted. United States v. Yanishefksy, 500 F.2d 1327 (2d Cir. 1974).

POINT IV

THE DEFENDANT DID NOT VOLUNTARILY, KNOWINGLY, INTELLIGENTLY AND COMPETENTLY WAIVE HIS RIGHT TO A JURY TRIAL; A HEARING SHOULD HAVE BEEN CONDUCTED BY THE COURT BELOW TO DETERMINE THE SUFFICIENCY OF DEFENDANT'S WAIVER.

Article 3, Section 2 of the United States Constitution provides that "the Trial of all Crimes ... shall be by jury.".

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the government."

The issue raised is whether defendant validly waived his constitutional right to trial by jury.

A waiver of a constitutional right must be voluntary, intelligent, knowing and competent. Boykin v. Alabama, 395 U.S. 238 (1969).

The Supreme Court in Singer v. United States, 380 U.S. 24, 34 (1965) quoted two earlier decisions on the question of jury waiver:

> "[n]ot only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and

> has such a place in our traditions, that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion with an eye to avoid unreasonable or undue departures from that mode of trial... , Patton v. United States, 281 U.S. 276, 312-313 (1930)."
>
> * * *
>
> "[O]ne charged with a serious federal crime may dispense with his constitutional right to a jury trial, where this action is taken with his express, intelligent consent, where the government also consents, and where such action is approved by the responsible judgment of the trial court. , Adams v. U.S. ex rel McCann, 317 U.S. 269, 281 (1942)."

The Court must be satisfied that the defendant understands the consequences of his waiver, U.S. ex rel Tillman v. Allridge, 350 F.Supp. 189, 191 (E.D. Pa. 1972) and the record must, therefore, reflect that the defendant deliberately and not inadvertantly waived his right to be tried by jury, Horne v. U.S., 264 F.2d 40 (5th Cir. 1959), cert. denied 360 U.S. 934 (1960). The requirement that evidence of the waiver appear on the record has led many courts to suggest the necessity of a hearing or at least questioning by the court of the defendant on the issue of his waiver. For example, in U.S. v. Hunt, 413 F.2d 983, 984 (4th Cir. 1969), the Court noted that it is

> "... better practice for the District Judge, when advised by defendant he desires to waive his right to jury trial, to interrogate defendant so as to satisfy himself that defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them."

Independent investigation by the Court into the constitutional validity of the defendant's waiver "facilitates review on appeal or on collateral attack by providing a more complete factual basis for determining whether there has been a voluntary waiver.", Estrada v. United States, 457 F.2d 255, 256 (7th Cir. 1972).

The District of Columbia Circuit Court of Appeals, in United States v. David, 511 F.2d 355, 361 (D.C. Cir. 1975) held

> "[w]hile Rule 23(a) insures that there be a documentary manifestation of the defendant's consent, that provision of course does not guarantee that the waiver is knowing and intelligent. Many courts - including our own - have indicated that trial judges would be well advised to directly question the defendant in all cases to determine the validity of any proffered waiver of jury trial. Such questioning is, of course, particularly crucial where circumstances cast doubt upon the validity of a given waiver."

Continuing in a footnote, the Court stated:

> "[i]n rejecting a prophylactic interrogation requirement, some courts have implied that in individual cases trial court interrogation of the defendant might be necessary. See United States v. Mitchell, 427 F.2d 1280 (3rd Cir. 1970); Hatcher v.

> United States, 122 U.S. App. D.C. 148, 352 F.2d 364 (1965), cert. denied, 382 U.S. 1030, 86 S.Ct. 654, 15 L.Ed.2d 542 (1966); see also Naples v. United States, 113 U.S. App.D.C. 281, 307 F.2d 618, 625-626 (1962). Moreover, the necessity of judging waivers on a case by case basis has long been recognized by this court. 'Whether there has been an intelligent waiver depends upon the facts and circumstances of a particular case including the background, experience and conduct of the accused.... Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).'"

The circumstances of this case cast doubt on the validity of defendant's waiver, as voluntary, knowing and intelligent; and raise serious questions as to whether there was sufficient basis in the record for the Court below to determine if the waiver was valid.[30]

[30] At 478 the Court said, "Now, so far as the waiver of jury trial is concerned, I was somewhat surprised of Mr. Graber's continued willingness to waive the jury trial and more surprised that he didn't say, but before another Judge."
The jury trial waiver is dated September 1 (115); it does not appear when defendant signed it. If it was on September 2, he was "emotionally disturbed" to the extent he could not cooperate in the defense (93). If it was on September 7, he had had an emergency visit to Mercy Hospital four days previously for "anxiety exhaustion, dehydration, gastritis and possible coronary" (469). The record of September 7 is barren of any inquiry, or any finding or report of the §4244 examination.

The defendant suffered serious emotional and physical disabilities. The Court failed even minimally to interrogate the defendant as to his competence and understanding of the waiver. The ineffective assistance rendered by defendant's counsel and the dissatisfaction and hostility defendant felt towards his attorney precluded execution of the waiver with the effective and adequate assistance of counsel.

A jury trial waiver should be particularly subject to scrutiny where, as here, the ultimate trier of the fact, in reliance upon defendant's counsel's representations as to his unreliability, has caused him to be arrested. The devastatingly unfavorable impression thereby created in the Trial Court's mind should have been known by defendant to be ineradicable.

Conclusion

The judgment should be reversed, the jury trial waiver set aside, and a new trial granted. Alternatively, the matter should be remanded for a hearing on the motion for a new trial.

Respectfully submitted,

RICHARD C. CAHN, ESQ.
CAHN AND CAHN, P.C.
Attorneys for Defendant
Office and P.O. Address
196 East Main Street
P.O. Box 680
Huntington, New York 11743
(516) 427-3050

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
SECOND CIRCUIT

UNITES DTATES OF AMERICA,

- against -

RAYMOND GRABER,
Defendant-Appellant.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF ss.:

I, Velma N. Howe, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216

That on the 10th *day of* Feb. *19* 77, *deponent served the annexed*

Brief

upon David Trager *attorney(s) for*

in this action, at 225 Cadman Plaza
Brooklyn, N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 10th
day of February, *19* 77.

Velma N. Howe

Velma N. Howe

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977